No. 99-1178

Supreme Court, U.S.
FILED
SEP 20 2000
CLERK

In The

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF CALIFORNIA, IOWA, MAINE, NEW JERSEY, OKLAHOMA, OREGON, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

BILL LOCKYER
Attorney General of the State of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
DENNIS M. EAGAN
Supervising Deputy Attorney General
JOSEPH BARBIERI
Deputy Attorney General
Counsel of Record
1515 Clay Street, Suite 2000
Oakland, California 94612-1413
Telephone: (510) 622-2139

THOMAS J. MILLER
Attorney General of the State of Iowa

ANDREW KETTERER
Attorney General of the State of Maine

JOHN J. FARMER, JR.
Attorney General of the State of New Jersey

W. A. DREW EDMONDSON
Attorney General of the State of Oklahoma

HARDY MYERS
Attorney General of the State of Oregon

(Additional counsel listed on inside cover)

BEST AVAILABLE COPY

WILLIAM H. SORRELL
Attorney General of the State of Vermont

CHRISTINE O. GREGOIRE
Attorney General of the State of Washington
Attorneys for Amici Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT 4

I. THE PLACEMENT OF DREDGED OR FILL MATERIAL IN THE WATERS OF THE UNITED STATES IS A CLASS OF ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE 4

A. *Lopez* and *Morrison* Require Close Scrutiny of the Regulation of Noneconomic Activity 4

B. The Relevant Class of Activity Is the Placement of Dredged or Fill Material in Navigable Waters..... 5

C. The Placement of Dredged or Fill Material Is an Economic Activity..... 8

D. The Placement of Dredged or Fill Material in Wetlands Substantially Affects Interstate Commerce 11

1. Where Economic Activity Is Involved, Legislation Should Be Sustained Unless There Is No Rational Basis for Congress to Conclude That the Economic Activity in the Aggregate Substantially Affects Interstate Commerce..... 12

2. There Was a Rational Basis for Congress to Conclude That the Placement of Dredged or Fill Material in Wetlands Substantially Affects Interstate Commerce 14

TABLE OF CONTENTS – Continued

Page

II. SECTION 404'S PERMIT REQUIREMENT IS NOT LAND USE CONTROL, BUT ENVIRONMENTAL REGULATION THAT PROTECTS THE STATES FROM THE INTERSTATE IMPACTS OF WETLAND DEGRADATION 21

A. Section 404 Protects the Individual States From the Consequences of Fill in Other States, and Complements the States' Own Programs 21

B. Section 404's Permit Requirement Is Environmental Regulation, Not a Form of Land Use and Zoning Traditionally Reserved to the States 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Allied Local and National Regional Manufacturers Caucus v. United States Environmental Protection Agency, 215 F.3d 61 (D.C.Cir. 2000) 20

Andrus v. Allard, 444 U.S. 51 (1979) 27

C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 18, 19

California Coastal Commission v. Granite Rock Co., 480 U.S. 572 (1987) 28

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 18, 19

Chemical Waste Management v. Hunt, 504 U.S. 334 (1992) 10

Cooley v. United States, 46 Fed. Cl. 538 (2000) 10

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992) 18, 19

Friends of the Earth v. Hintz, 800 F.2d 822 (9th Cir. 1986) 9

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 8

Gibbs v. Babbitt, 214 F.3d 483 (2000) 20

Hartsell v. *United States*, 127 F.3d 343 (1997), *cert. denied*, 523 U.S. 1030 (1998) 20

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 24

Hill v. Boy, 144 F.3d 1446 (11th Cir. 1998) 9

TABLE OF AUTHORITIES – Continued

Page

Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981) 14, 19, 24, 28

Hoffman Homes, Inc. v. Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993).....9, 17

Hughes v. Oklahoma, 441 U.S. 322 (1996) 19

Maryland v. Wirtz, 392 U.S. 183 (1968)..... 7

Michigan Peat v. United States Environmental Protection Agency, 175 F.3d 422 (6th Cir. 1999) 9

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 27

Monongahela Power Company v. Marsh, 809 F.2d 41 (D.C.Cir. 1987) 9

National Association of Homebuilders v. Babbitt, 130 F.3d 1041 (D.C.Cir. 1997), *cert. denied*, 524 U.S. 957 (1998)..... 20

National League of Cities v. Usery, 426 U.S. 833 (1976) 8

North Dakota v. United States, 460 U.S. 300 (1983) 27

Perez v. United States, 402 U.S. 146 (1942) 8, 14

Philadelphia v. New Jersey, 437 U.S. 617 (1978).....10, 18

Printz v. United States, 521 U.S. 898 (1997)..... 2

Proyect v. *United States*, 101 F.3d 11 (2d Cir. 1996) 8

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999)..... 9

Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) 10

TABLE OF AUTHORITIES – Continued

Page

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000)..... 22

United States v. Brace, 41 F.3d 117 (3d Cir. 1994)..... 9

United States v. Deaton, 209 F.3d 331 (4th Cir. 2000) 9

United States v. Bramble, 103 F.3d 1475 (9th Cir. 1996)..... 20

United States v. Darby, 312 U.S. 100 (1941)..... 24

United States v. Lopez, 514 U.S. 549 (1995) ..... *passim*

United States v. Morrison, ___ U.S. ___, 120 S.Ct. 1740 (2000)..... *passim*

United States v. *Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).....8, 20

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 9, 14, 16, 20

United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) 9

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) 9

Wickard v. Filburn, 317 U.S. 111 (1942)..... 11

CONSTITUTION

United States Constitution Commerce Clause.... *passim*

FEDERAL STATUTES & REGULATIONS

15 U.S.C.

§§ 2601-2671..... 19

TABLE OF AUTHORITIES – Continued

Page

16 U.S.C.
§ 701 27
§§ 703-12 27
§§ 1301-11 24
§§ 1361-1421h 19
§§ 1451-1464 19
§§ 1531-1544 19
§§ 2601-2671 19
§§ 4401-14 24

30 U.S.C.
§§ 1201-1328 19
§§ 9601-9675 19

33 U.S.C.
§ 1251 ..... 6, 28
§ 1344(a) 6
§ 1344(g) 26

42 U.S.C.
§§ 300f-300j 19
§§ 9601-9675 19
§ 4321 24
§§ 6901-6992k 19

Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997) 22

TABLE OF AUTHORITIES – Continued

Page

33 C.F.R
§ 323.2(f) 10
§ 323.5 26

42 Fed. Reg. 26,961 (May 24, 1977) 24

65 Fed. Reg. 12,818 (Mar. 8, 2000) 11

STATE STATUTES & REGULATIONS

California Fish & Game Code
§ 2785(g) 7

California Public Resources Code
§ 30121 7

California Code of Regulations, Title 14
§ 15226 25

Connecticut Gen. Stat.
§ 22a-29(2) 7

20 Illinois C.S.A.
§ 830/1-6 7

District of Columbia Code
§ 6-921(27) 7

Kentucky Rev. Stat.
§ 146.550(1) 7

Massachusetts Ann. Laws, ch. 131
§ 40 7

TABLE OF AUTHORITIES – Continued

Page

Maryland Env. Code

§ 5-901(f) 7

New Hampshire Rev. Stat.

§ 482-A:2 7

Nebraska Rev. Stat.

§ 244.388 7

Oregon Rev. Stat.

§ 196.800(16) 7

Texas Nat. Res. Code

§ 221.001(6) 7

Virginia Code Ann.

§ 62.1-44.3 7

Wisconsin Stat.

§ 23.32(1) 7

Delaware Code Ann., Tit. 7

§§ 6601-6620 23

Georgia Code Ann.

§ 12-5-280 23

Michigan Comp. Ann.

§§ 281.683-685 23

§§ 281.701-722 23

§§ 322.701 et seq. 23

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Cal. Travel and Tourism Comm'n, *Fast Facts 2000* (2000) 18

California Wetlands Information Systems, <http://ceres.ca.gov/wetlands/geoinfo/vernal_pools> 25

Chicago Tribune, Aug. 13, 2000 18

Demissie, et al., *Influence of Wetlands on Streamflow in Illinois, Ill. State Water Survey* 15

Gibbs, *Importance of Small Wetlands for the Persistence of Local Populations of Wetland-Associated Animals, Wetlands*, Vol. 13, No. 1, Mar. 1993 17

Houck & Rolland, *Environmental Federalism in Wetlands Regulation*, 54 Md.L.Rev. 1242 (1995) 15, 17

Ill. Dept. of Natural Resources, *Nationwide Survey of State Wetland Regulatory Programs* (Oct. 1997) 23

Kettering, *Praise for General Permits*, National Wetlands Newsletter, Vol. 16, No. 4, July/Aug. 1994 26

Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends*, Prepared for the Association of State Wetland Managers (1995) 25, 26

Kusler, et al., *Wetlands, Scientific American* (Jan. 1994) 21, 23

McClurg, *The Klamath River Basin: A Microcosm of Water in the West*, Western Water Magazine, May/June 2000 22

N.Y. Times, July 20, 1993 16

Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* (1984) ... 15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

San Francisco Bay Conservation and Dev. Comm'n, 1999 Annual Report..... 26

Southwick Associates, *The Economic Benefits of Watchable Wildlife Recreation During 1996 in Illinois* (1998)..... 22

Stewart, *Technical Aspects of Wetlands as Bird Habitat*, U.S.G.S. Water Supply Paper 2425 16

The Economic Value of Wetlands, Wetlands' Role in Flood Protection in Western Washington, Wash. Dept. of Ecology, Oct. 1997 15

Costanza, et al., *The Value of the World's Ecosystem Services and National Capital*, Nature, Vol. 387, May 15, 1997..... 16

U.S. Fish and Wildlife Service, *1994 Update to the North American Waterfowl Management Plan* 16, 17

U.S. Fish and Wildlife Service, *1996 National Survey of Fishing, Hunting, and Wildlife Associated Recreation*..... 17

U.S. Fish and Wildlife Service, *The Economic Importance of Hunting* (1998)..... 17, 18, 22

Zinn and Copeland, *Wetland Issues*, Congressional Research Service Issue Brief, May 1, 2000..... 29

INTERESTS OF AMICI CURIAE

Scientific and technological progress has brought with it an increased awareness that the cumulative effects of many isolated human activities have serious consequences for the environment. Not that long ago, it would have been considered implausible to suggest that spraying an aerosol can damaged the earth's atmosphere, that eating a hamburger contributed to the loss of rain forest, or that filling a small "depression" of water harmed wildlife. Despite this growing awareness, our knowledge of how human intervention in the environment affects the nation remains imperfect. Translated into constitutional terms, it means that, in a world with few certain answers, courts should be extremely reluctant to find that Congress is powerless to determine that a particular environmental harm affects the national economy and requires a national solution. Unless the legislative judgment is truly irrational, it should be left to the political process to decide whether Congress has gone too far.

In this case, Congress made a rational judgment, supported by a wealth of compelling evidence, that a national response to prevent the degradation of the nation's remaining wetlands was necessary. The individual States benefit from this national approach. The harmful effects of wetland destruction – such as impaired water quality, increased flooding, reduced ground water supply, and the destruction of wildlife habitat – do not respect interstate boundary lines. Wisely employed, federal regulation insures a measure of protection for the nation's wetlands and helps reduce the cumulative impacts that the placement of fill in one State may have on the environment and economy in other States. Federal regulation supplements the efforts of those States that

have wetland regulations, and fills the regulatory vacuum in others that have chosen not to adopt their own wetland programs.

The protection of migratory birds provides a perfect subject for federal regulation. No matter how comprehensively one State were to regulate wetlands, its regulation would never be able to adequately protect migratory birds whose survival necessarily depends on regulation that insures the supply of wetland habitat in many States. Migratory birds, like wetlands themselves, are a type of interstate resource whose loss would have substantial repercussions on the economies of the States. Although the individual States can take action to protect these resources within their borders, only the federal government can insure that the States' interests in these interstate resources are fully protected by a national regulatory scheme.

From time to time Congress has improperly imposed its will on the States, and this Court has stepped in when necessary to remind Congress of the appropriate boundaries of federalism. *E.g., Printz* v. *United States*, 521 U.S. 898 (1997). But this is not one of those cases. Congress made a policy judgment to address the impacts that the filling of millions of acres of wetlands would have on the nation's health and economy. This was a conventional exercise of federal environmental regulation, not land use planning traditionally reserved to the States. There may be times when wetland regulation under section 404 will duplicate or conflict with the approach taken by an individual State. Any such policy disputes should be worked out within the political system, however, and not be converted into a constitutionally-mandated prohibition on Congress' ability to respond to a national environmental crisis.

SUMMARY OF ARGUMENT

1. An analysis of the validity of legislation under the Commerce Clause begins with a definition of the class of activity being regulated. In this case, Congress defined the relevant class of activity as the discharge of dredged or fill material into "navigable waters" as defined in the Act. The petitioner incorrectly assumes that the relevant class of activity is limited to wetlands subject to the "migratory bird rule." This approach improperly narrows Congress' classification because the Act does not distinguish among subcategories of wetlands and rationally treats the discharge of dredged or fill material as a single subject of national concern.

2. The decisions in *United States* v. *Lopez*, 514 U.S. 549 (1995) and *United States* v. *Morrison*, ___ U.S. ___, 120 S.Ct. 1740 (2000) set limits on Congress' authority to regulate noneconomic activity under the Commerce Clause. But the placement of fill – an activity typically associated with commercial development or public works projects – is economic activity. Because the class of activity being regulated is economic, it is permissible to aggregate the impacts of the activity to determine whether the regulated activity has an impact on interstate commerce, even if the particular activity itself is intrastate and even if, in trivial instances, it has no discernible impact on interstate commerce. The deposition of dredged or fill material in wetlands, with its resulting adverse impacts on water quality, flood control, erosion control and wildlife, has substantial effects on interstate commerce. Even if the Court were to consider only the impacts of the "migratory bird rule," there is a rational basis for concluding the destruction of migratory bird habitat would have a substantial impact on interstate commerce.

3. Because the filling of wetlands has significant interstate impacts, federal wetlands regulation is both appropriate and necessary. In addition to protecting the citizens of one State from the consequences of wetlands fill that occurs in another State, federal wetlands regulation supplements existing State regulation and provides the States with additional resources and expertise. Federal, State and local governments are working together to improve the regulatory process, and are capable of resolving any policy conflicts through the political process.

4. Federal regulation of the filling of wetlands does not intrude into an area of traditional State concern. The federal government long has legislated in the field of pollution control and resource protection. This environmental regulation embodied in the Clean Water Act does not dictate land uses and is fundamentally different than the planning and zoning functions traditionally reserved to the States.

ARGUMENT

I. THE PLACEMENT OF DREDGED OR FILL MATERIAL IN THE WATERS OF THE UNITED STATES IS A CLASS OF ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

A. *Lopez* and *Morrison* Require Close Scrutiny of the Regulation of Noneconomic Activity

The Court's recent decisions in *Lopez* and *Morrison* were significant for at least two reasons. The decisions imposed substantive outer limits on the reach of Congress' authority under the Commerce Clause, and they emphasized that while judicial scrutiny of legislation under the Commerce Clause remains highly deferential,

the courts have an obligation to review Congress' observance of the clause's limitations. Although the Court found the federal statutes in *Lopez* and *Morrison* deficient for a number of reasons, the critical analytical distinction was that the statutes regulated what the Court found to be essentially "noneconomic" activity. *Lopez*, 514 U.S. at 560-561; *Morrison*, ___ U.S. ___, 120 S.Ct. at 1750 ("the noneconomic, criminal nature of the conduct at issue was central to our decision in [*Lopez*]"). Where noneconomic activity is involved, it is necessary to show that the activity itself has a direct impact on interstate commerce. *Lopez*, 514 U.S. at 559-61; *Morrison*, ___ U.S. ___, 120 S.Ct. at 1751. Where statutes regulate economic activity, Congress may regulate the activity if, in the aggregate, the activity has a substantial effect on interstate commerce, even if the particular activity in question involves solely intrastate activity and even if its impacts would be deemed trivial. *Id.*

The federal legislation at issue in *Lopez* and *Morrison* understandably prompted the concern of the Court. Both statutes regulated what was essentially noneconomic activity (the possession of handguns and gender-related violence) and both arguably required the piling of inferences to explain why these activities affected the commerce of the country. The Court found that these statutes exceeded the outer limits of the Commerce Clause because neither directly touched economic activity and both relied on an analytical path that would have swept every topic of legislation within congressional reach.

B. The Relevant Class of Activity Is the Placement of Dredged or Fill Material in Navigable Waters

Despite the restrictions announced in *Lopez* and *Morrison*, the regulation at issue in this case fits comfortably

within the permissible scope of the Commerce Clause power. Any analysis regarding the scope of congressional authority under the Commerce Clause begins with an identification of the class of activity being regulated. The activity being regulated here is neither navigable waters nor the movement of migratory birds. The class of activity being regulated is that for which a permit is required: the "discharge of dredged or fill material" into navigable waters as defined by the Act. 33 U.S.C. § 1344(a).

The petitioner assumes that the relevant class of activity is the filling of wetlands that are used by migratory birds because the wetlands on its property happened to fall into this particular subcategory of section 404 permit jurisdiction. If the petitioner's approach to classification were accepted, the filling of every subcategory of wetlands – prairie potholes, vernal pools and the like – would be subject to a separate Commerce Clause analysis, and the federal government would be required to justify separately why each particular subcategory of wetlands bore the requisite impact on interstate commerce. Section 404, however, does not discriminate among categories of wetlands; it applies to the placement of dredged or fill material in any waters within the scope of the Act.[1]

There is a rational basis supporting this broader classification. The purposes of the Clean Water Act, 33 U.S.C.

---

[1] Under the petitioner's approach, a separate Commerce Clause challenge could be launched for each of the more than 1,000 listed endangered species. Aside from the enormous burden this approach creates for the courts, these efforts to segment Congress' broader scheme into subclasses understate the impacts of the activity being regulated and conflict with the principle that economic activities must be reviewed for their aggregated effects on interstate commerce.

§ 1251, apply to all wetlands because all wetlands, including isolated wetlands, perform the same beneficial functions such as water quality protection, flood control, erosion control and the preservation of wildlife habitat. *See* pp. 15-19, 21-22 *infra*. This approach also conforms to that taken in most wetland legislation, which treats wetlands as a single resource to be protected and does not distinguish between isolated and nonisolated wetlands. *See, e.g.*, Cal. Pub. Resources Code § 30121 (broadly defining wetlands without distinguishing between isolated and nonisolated wetlands); Cal. Fish & Game Code § 2785(g); Conn. Gen. Stat. § 22a-29(2); D.C. Code § 6-921(27); 20 Ill.C.S.A. § 830/1-6; Ken. Rev. Stat. § 146.550(1); Mass. Ann. Laws ch. 131, § 40; Nebr. Rev. Stat. § 244.388; N.H. Rev. Stat. § 482-A:2; Ore. Rev. Stat. § 196.800(16); Tex. Nat. Res. Code § 221.001(6); Va. Code Ann. § 62.1-44.3; Wis. Stat. § 23.32(1); *but cf.* Md. Env. Code § 5-901(f) (defining "isolated nontidal wetland"). That the Corps chose to subcategorize various types of wetlands for administrative purposes does not alter this conclusion. The migratory bird rule is just one essential part of a "larger regulation" to protect the nation's waters from the environmental and economic impacts of fill, *see Lopez*, 514 U.S. at 561, and its impacts should not be singled out and scrutinized in isolation from the impacts of the other activities subject to section 404's permit requirement.

This broader approach to classification honors the language of section 404. It also is consistent with the Court's approach under the Commerce Clause, which has analyzed the generic activity that is the subject of the regulation and not some narrowly-defined activity that is a subset of the congressional scheme. *See Maryland* v. *Wirtz*, 392 U.S. 183, 197 n. 7 (1968), *overruled on other*

grounds, National League of Cities v. *Usery*, 426 U.S. 833 (1976), *overruled by Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (recognizing the power of Congress "to declare that an entire class of activities affects commerce"); *Perez* v. *United States*, 402 U.S. 146, 152-54 (1942) (emphasizing need to analyze the impacts of a "class of activities"). This approach has been followed by the lower courts, which have refused to define the class of activity "so narrowly as to cover only those activities that do not have a substantial impact on interstate commerce." *Proyect* v. *United States*, 101 F.3d 11, 14 (2d Cir. 1996); *see United States* v. *Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997) (court's approach in defining class cannot be excessively narrow). Thus, the placement of dredged or fill material in navigable waters (however that term is ultimately construed by the Court) is the appropriate class of activity to be analyzed.[2]

C. The Placement of Dredged or Fill Material Is an Economic Activity

The next question is whether this class of activity constitutes "economic activity" for the purposes of the Court's *Lopez/Morrison* analysis. The placement of dredged or fill material in wetlands is economic activity. In virtually every reported decision involving a section 404 permit, the placement of fill is an integral part of a commercial activity, such as the construction of a residential subdivision, an industrial building, or a public works

---

[2] Even if the relevant class of activity were more narrowly defined as the placement of dredged or fill material into isolated wetlands used by migratory birds, the activity still would constitute economic activity and, albeit on a smaller scale, still would substantially affect interstate commerce. *See* pp. 16-18 *infra*.

project similar to the solid waste facility proposed by the petitioner here. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 21 (1985) (placement of fill on 80 acres of wetlands for construction of residential housing development); *United States* v. *Deaton*, 209 F.3d 331 (4th Cir. 2000) (discharge of fill into 5-acre wetlands site for construction of residential housing development); *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) (proposing to fill 17.6 acres of wetlands for disposal of balefill); *Michigan Peat* v. *United States Environmental Protection Agency*, 175 F.3d 422 (6th Cir. 1999) (proposing discharge into more than 2,000 acres of wetlands for peat mining operations); *Hill* v. *Boy*, 144 F.3d 1446 (11th Cir. 1998) (discharge of dredge and fill material into 33 acres of wetlands as part of construction of earthen dam and 650-acre reservoir); *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) (filling of wetlands as part of planned unit development project serving 80,000 residents); *United States* v. *Brace*, 41 F.3d 117 (3d Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995) (discharge of material into 30-acre site for commercial farming operation); *Hoffman Homes, Inc.* v. *Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993) (filling of 14 acres of wetlands as part as residential subdivision); *United States* v. *Pozsgai*, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) (dumping of rubble into 14-acre wetland for construction of commercial truck repair garage); *Monongahela Power Company* v. *Marsh*, 809 F.2d 41 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 816 (1987) (discharge of material into 7,000 acres of wetlands during construction of hydroelectric facility); *Friends of the Earth* v. *Hintz*, 800 F.2d 822 (9th Cir. 1986) (approving permit to fill 17-acre wetland site for sawmill logging complex). The types of dredged or fill material

identified in the Corps' regulations also contemplate that the material will be placed in conjunction with economic activity.[3]

In addition, the Court itself has characterized the disposal of solid waste, the type of fill involved here, as a commercial activity. *See Chemical Waste Management* v. *Hunt*, 504 U.S. 334, 340 n.3 (1992) (noting that waste long has been recognized as an "article of commerce"); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 621-23 (1978) (waste is an article of commerce and subject to the Commerce Clause). It would be paradoxical if landowners did not characterize the placement of fill as an economic activity, because they have frequently argued that the denial of a permit under section 404 constitutes the denial of all economic use of their property. *See, e.g., Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 802 (Fed. Cir. 1993); *Cooley* v. *United States*, 46 Fed. Cl. 538 (2000) (awarding over $2 million for taking of property based on denial of section 404 permit).

---

[3] The "discharge of fill material" is defined to include the

> "Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs." 33 C.F.R. § 323.2(f).

The petitioner's argument that the placement of fill is noneconomic because a section 404 permit sometimes may be required for a small, private project is unpersuasive. The largest fill projects are invariably commercial or public works projects, *see* pp. 9-10 *supra*, and it can be assumed that small, private projects cumulatively contribute only a small portion of the total fill material for which section 404 permits are sought. Additionally, the placement of dredged or fill material for individual residential projects is likely to be covered by a nationwide permit, and not subject to individualized permit review. *See, e.g.*, 65 Fed. Reg. 12,818 (Mar. 8, 2000). Furthermore, even the placement of dredged or fill material for private non-commercial use fairly may be characterized as an economic activity, because the activity itself costs money to perform and affects the value of the property that is being filled.

D. The Placement of Dredged or Fill Material in Wetlands Substantially Affects Interstate Commerce

Because it involves the regulation of an economic activity, section 404's regulation of the placement of dredged or fill material in wetlands satisfies the *Lopez* analysis as long as the activity in the aggregate has a substantial effect on interstate commerce, even though it may involve solely intrastate activity and even though in individual instances there may be only a trivial impact on interstate commerce. *Lopez*, 514 U.S. at 558-61; *Morrison*, ___U.S. ___, 120 S.Ct. at 1751; *see Wickard* v. *Filburn*, 317 U.S. 111 (1942).

1. Where Economic Activity Is Involved, Legislation Should Be Sustained Unless There Is No Rational Basis for Congress to Conclude That the Economic Activity in the Aggregate Substantially Affects Interstate Commerce.

Preliminarily, there are significant practical difficulties that a court encounters when evaluating whether the regulation of a particular economic activity substantially affects interstate commerce that it does not confront when evaluating noneconomic activities. In cases such as *Lopez* and *Morrison*, courts are competent to analyze the impact of the noneconomic activity on interstate commerce because they are capable of testing the logic and inferences that purport to connect the noneconomic activity to interstate commerce. In cases involving economic activity, there is an inherent relationship between the activity and interstate commerce, either because the activity involves the expenditure of money, setting off a chain of events in the marketplace, or because the activity causes a physical change to the environment, generating a series of commercial transactions in response to the physical change.

Consequently, where the regulation of economic activity is being challenged, a court is required to make what is primarily a factual, technical assessment of the activity's impact on interstate commerce. In a case such as this, for example, the Court is asked to consider the functions of wetlands, the direct and cumulative physical impacts that the filling of wetlands in one State has on the natural resources in other States, and the interstate economic consequences that result from unregulated fill.

This inquiry implicates a considerable number of technical and economic issues.[4]

The practical problem becomes a philosophical one – is it appropriate for the courts to resolve these highly technical issues in the absence of an evidentiary record, and at what point does this ad hoc, judicial fact gathering lead the courts to substitute their judgment on the need for environmental protection for that of Congress? That wetlands were thought to be worthless swamps less than a century ago is more than just ironic; it says that courts should be hesitant to foreclose Congress' authority to respond to the dangers created by human intervention in the physical environment when the constitutional answer depends on an evolving body of knowledge that the experts themselves do not purport to fully understand. Convenient access to scientific information should not induce the courts to substitute their views on the wisdom of legislation for the fact-finding and representative decisionmaking that is the hallmark of the politically accountable legislative process.

---

[4] The list might include matters such as: (1) the methodologies for identifying and quantifying wetlands; (2) the hydrology of isolated wetlands and their relationship to the larger aquatic system; (3) the functions of isolated wetlands; (4) the methodology that should be used to quantify the economic impacts caused by filling of wetlands on water quality, flood control and erosion control, and the assessment of those economic impacts; (5) the aggregated effect that the loss of wetlands has on migratory birds and other wildlife; (6) the economic impact from lost recreation opportunities such as hunting and birdwatching caused by these impacts; and (7) the economic cost of replacing wetlands if they are filled without restrictions.

The Court's recent Commerce Clause decisions have not abandoned this view. *Morrison* reiterated the requirement that the Court would invalidate a statute only upon a "plain showing" that Congress had exceeded its constitutional bounds. *Morrison*, 120 S.Ct. at 1748; *see Lopez*, 514 U.S. at 573-574 (Kennedy, J., concurring). Nor has the Court repudiated its rule that the Court "must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 276 (1981); *see Riverside Bay View Homes, Inc.*, 474 U.S. at 134 (deferring to EPA's technical expertise that adjacent wetlands are bound up with the waters of the United States); *Perez*, 402 U.S. at 154-55 (deferring to congressional judgment that intrastate extortionate credit transactions affect interstate commerce).

Therefore, absent a demonstration by the petitioner that there was no rational basis for Congress to conclude that the placement of dredged or fill material in the aggregate substantially affects interstate commerce, the legislation should be sustained.

2. There Was a Rational Basis for Congress to Conclude That the Placement of Dredged or Fill Material in Wetlands Substantially Affects Interstate Commerce

There was a rational basis for concluding that the placement of dredged or fill material in wetlands has a substantial effect on interstate commerce. These impacts are addressed in the other briefs supporting the federal government's position and the following discussion is not exhaustive.

a. Wetlands, including isolated wetlands, represent one of the most important components in preserving environmental quality. Wetlands enhance water quality by cycling nutrients, storing organic material, and filtering some types of pollutants such as heavy metals. Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 43, 48-51 (1984). It has been reported, for example, that the loss of 50% of the country's remaining wetlands could result in expenditures of $75 billion just for increased sewage treatment for the removal of nitrogen. Houck & Rolland, *Environmental Federalism in Wetlands Regulation*, 54 Md.L.Rev. 1242, 1245 (1995). With the country's extensive network of interstate watersheds, pollution in one State can readily affect the water quality in another; pollution in six States has been held responsible for the poor health of Chesapeake Bay. *Id.*

Wetlands also facilitate flood control by detaining flood water and thereby curtailing flow peaks in downstream reaches. *E.g.*, Demissie et al., *Influence of Wetlands on Streamflow in Illinois*, Ill. State Water Survey, 1-2 (1993); Office of Technology Assessment, *supra*, at 43-46. Two case studies in the State of Washington demonstrated that the value of wetlands for flood control ranged from $8,000 to $51,000 per acre. *The Economic Value of Wetlands, Wetlands' Role in Flood Protection in Western Washington*, Wash. Dept. of Ecology, Oct. 1997, at 5. One study by the Corps concluded that the loss of headwaters in the Charles River could lead to annual flood damages of over $17 million, Office of Technology Assessment, *supra*, at 37; another documented the benefits provided by wetlands in reducing flood flows in southern Illinois, *id.* at 44-45. The loss of wetlands contributed to the enormous interstate damage caused by 1993 floods of the upper Mississippi, and wetlands have been identified as an

important resource for controlling flood damage along the Passaic River. N.Y. Times, July 20, 1993, § C (Science Desk), at 1, col. 1. Wetlands also provide enormous economic value with their contribution to the reduction of shoreline erosion. Office of Technology Assessment, *supra*, at 46-47.

The attributes of isolated wetlands – their value for water filtration, flood and erosion control, and species habitat – are similar to those of adjacent wetlands that the Court found appropriate for federal regulation in *Riverside Bayview Homes, Inc.*, 474 U.S. at 134-35. These wetland services, although often difficult to quantify, provide real value to the national economy. The services that ecosystems provide have been estimated worldwide at $33 trillion – 1.8 times more than the global gross national product. Costanza, et al., *The Value of the World's Ecosystem Services and National Capital*, Nature, Vol. 387, May 15, 1997, at 259. The economic services provided by wetlands (such as water supply, nutrient cycling, waste treatment and wildlife) alone has been estimated globally at more than $330 billion annually. *Id.* at 254, 256.

b. Even if one were to narrowly define the class of regulated activity at issue in this case as the filling of isolated wetlands used by migratory birds, the loss of those wetlands would have a substantial impact on interstate commerce. Wetlands provide food, shelter, resting and feeding places on migratory routes, and all migratory birds depend on wetlands for their survival. *E.g.*, U.S. Fish and Wildlife Service, *1994 Update to the North American Waterfowl Management Plan* 20. Destroying bird habitat is simply a slower and more insidious way of destroying the birds themselves. *See, e.g.*, Stewart, *Technical Aspects of Wetlands as Bird Habitat*, U.S.G.S. Water

Supply Paper 2425, at 7, 10. The filling of isolated wetlands is of particular concern because, for many migratory birds, small isolated wetlands provide a unique habitat that is essential to their survival. Gibbs, *Importance of Small Wetlands for the Persistence of Local Populations of Wetland-Associated Animals*, Wetlands, Vol. 13, No. 1, Mar. 1993, at 25. The draining of prairie potholes in North Dakota, for example, has threatened to eliminate a variety of wintering waterfowl of Virginia, Maryland and Delaware. Houck & Rolland, *supra*, 54 Md.L.Rev. at 1248 (citing study).

No speculative inferences are needed to connect the reduction of migratory bird populations to substantial impacts on interstate commerce. Billions of dollars are spent annually on the hunting, recreational observation and study of migratory birds. Studies show, for example, that in 1996 those engaged in the hunting of migratory birds expended more than $2.99 billion, U.S. Fish and Wildlife Service, *The Economic Importance of Hunting* (prepared by Southwick Associates) at 8 (1998); those engaged in observation and photography of wildlife spent more than $9.6 billion in 1991 for related goods and services, U.S. Fish and Wildlife Service, *1996 National Survey of Fishing, Hunting, and Wildlife Associated Recreation*, at 90-91 (tables 39, 40). *See also Hoffman Homes*, 999 F.2d at 261 ("millions of people spend billions of dollars annually on hunting, trapping, and observing migratory birds"); *1994 Update to the North American Waterfowl Management Plan, supra*, at 4 (more than 30 million people spend billions of dollars annually on recreational activity related to migratory waterfowl); Office of Technology Assessment, *supra*, at 54. Much of this money is spent in rural areas where "sportsmen's dollars often mean the

difference between real jobs or hard-core unemployment." *The Economic Importance of Hunting, supra,* at 5.

To say, as the petitioner does, that the pursuit of hunting and birdwatching is a noncommercial activity is to engage in a form of denial about the enormous role that tourism and recreation plays in the economy of the country. The performance of a recreational activity is the end product of a series of economic transactions between the recreational user and the persons that supply the goods and services. All objects of interstate trade merit Commerce Clause protection, *Philadelphia* v. *New Jersey,* 437 U.S. at 622, including service industries, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison,* 520 U.S. 564, 577 n. 10 (1997).[5]

c. The disposal of solid waste, the purpose for which fill was proposed in this case, has a substantial effect on interstate commerce. *See C&A Carbone, Inc.* v. *Town of Clarkstown,* 511 U.S. 383, 390-91 (1994) (referring to the profitable business of waste collection); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Department of Natural Resources,* 504 U.S. 353, 359 (1992) (commercial transactions involving waste disposal "unquestionably have an interstate character"). Public and private entities involved in waste disposal often seek to deposit waste across state lines; for example, the petitioner here currently sends the waste intended for the proposed balefill facility to Bristol, Wisconsin. Chicago Tribune, Aug. 13, 2000, § 4, at 1. Indeed, an entire branch of dormant Commerce Clause jurisprudence has risen around the

[5] For example, tourism and travel is the third largest employer in California, generating expenditures of over $67 billion statewide. Cal. Travel and Tourism Comm'n, *Fast Facts 2000,* at 2 (2000).

efforts of States to regulate the flow of solid waste across state lines. *E.g., C&A Carbone; see Hughes* v. *Oklahoma,* 441 U.S. 322, 326 n.2 (1996) (definition of commerce is same when relied on to strike down state legislation as it is when relied on to support federal regulation).[6]

d. A determination that Congress is powerless to regulate the filling of our nation's wetlands would call into question the validity of considerable federal environmental legislation. Statutes such as the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, are not meaningfully distinguishable from the Clean Water Act. They all regulate forms of economic activity that are often, but not always, intrastate in character, and that in the aggregate have an enormous impact on the national economy.[7] The Court's cases have "uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution." *Hodel* v. *Virginia Surface Mining,* 452 U.S. at 282-283 (permitting

[6] The petitioner, correctly, does not contend that its status as a governmental entity changes the Commerce Clause analysis. *See Camps Newfound/Owatonna, Inc.* v. *Town of Harrison,* 520 U.S. 564, 583-84 (1997); *Fort Gratiot Sanitary Landfill, Inc.,* 504 U.S. at 359.

[7] The list of federal statutes protecting the environment and natural resources is extensive. E.g., Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464; Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h; the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-83; the Endangered Species Act, 16 U.S.C. §§ 1531-1544; the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671; the Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j.

regulation of harmful environmental effects of surface coal mining); *see Riverside Bayview Homes*, 474 U.S. 121 (upholding Corps' regulation of adjacent wetlands under the Clean Water Act as within scope of Commerce Clause). If Congress can order the cleanup of intrastate sites, it is difficult to understand why it should not have a say about the type of material that goes into them in the first place.[8]

Therefore, Congress is authorized to regulate the placement of fill within navigable waters, including isolated wetlands, because the placement of fill is an economic activity that in the aggregate has a substantial effect on interstate commerce.[9]

---

[8] Lower court decisions applying *Lopez* or *Morrison* and upholding environmental regulation include *Allied Local and National Regional Manufacturers Caucus* v. *United States Environmental Protection Agency*, 215 F.3d 61 (D.C.Cir. 2000) (rejecting challenge to Clean Air Act architectural coatings rule); *Gibbs* v. *Babbitt*, 214 F.3d 483 (2000) (concluding that Fish and Wildlife Service regulation prohibiting the taking of red wolf on private land is valid exercise of power under Commerce Clause); *National Association of Homebuilders* v. *Babbitt*, 130 F.3d 1041 (D.C.Cir. 1997), *cert. denied*, 524 U.S. 957 (1998) (upholding protection of endangered species that exist within a single state); *Hartsell* v. *United States*, 127 F.3d 343 (1997), *cert. denied*, 523 U.S. 1030 (1998) (upholding congressional authority to regulate pollution discharge into nonnavigable waters); *Olin Corp.*, 107 F.3d 1506 (finding that regulation of onsite waste disposal constitutes an appropriate element of Congress' broader scheme to protect interstate commerce from pollution and upholds constitutionality of CERCLA); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996) (rejecting challenge to constitutionality of Bald Eagle Protection Act).

[9] The States join in the argument of the federal government that the Corps' assertion of jurisdiction over isolated wetlands and its reliance on the migratory bird rule was procedurally proper and that, as a matter of statutory construction, was within the scope of the Clean Water Act.

II. SECTION 404'S PERMIT REQUIREMENT IS NOT LAND USE CONTROL, BUT ENVIRONMENTAL REGULATION THAT PROTECTS THE STATES FROM THE INTERSTATE IMPACTS OF WETLAND DEGRADATION

A. Section 404 Protects the Individual States From the Consequences of Fill in Other States, and Complements the States' Own Programs

There are numerous reasons why federal wetlands regulation benefits the States and complements their own wetland protection programs.

1. The citizens of one State have a legitimate interest in maintaining healthy wetlands throughout the country. Federal wetlands regulation insures some measure of protection from the effects that the filling of wetlands in one State may have on water quality, flood control and wildlife in another State. Citizens in one State have an additional reason to be concerned about what goes on in other States, because their federal taxes help pay the bill when federal assistance is required through increased public healthcare costs, flood protection, emergency relief and environmental cleanups when wetlands are not allowed to do their job.

The interstate nature of these various impacts was previously addressed. *See* pp. 15-19 *supra*. Wetlands are not static water systems; they are linked to other wetlands and to other aquatic systems and are highly affected by human activity throughout the watershed. Kusler, et al., *Wetlands*, Scientific American 68-70 (Jan. 1994). Numerous water basins and water bodies overlap state lines, and are affected by wetlands degradation

originating in one State. Further examples include the Klamath River basin that California shares with Oregon, *see* McClurg, *The Klamath River Basin: A Microcosm of Water in the West*, Western Water Magazine, May/June 2000, at 11-12; Lake Tahoe, which is shared by California and Nevada, *see Tahoe-Sierra Preservation Council, Inc.*, v. *Tahoe Regional Planning Agency*, 216 F.3d 764, 767-68 (9th Cir. 2000) (describing effect of wetlands disturbance on water quality of Lake); and the Apalachicola-Chattahoochee-Flint (ACF) River system, which stretches across Florida, Georgia and Alabama, *see* the *Apalachicola-Chattahoochee-Flint River Basin Compact*, Pub. L. No. 105-104, 111 Stat. 2219 (1997).

2. The citizens of the individual States particularly benefit from section 404's protection of migratory bird habitat. In Illinois, for example, the hunters of migratory birds spent approximately $293 million in 1996 alone, U.S. Fish and Wildlife Service, *The Economic Importance of Hunting, supra*, at 8, and more than 1.2 million people in Illinois (including over 100,000 non-residents) spent an average of $231 each in the observation, feeding and photographing of waterfowl, Southwick Associates, *The Economic Benefits of Watchable Wildlife Recreation During 1996 in Illinois*, at 4, 8 (1998). The destruction of wetland habitat in one State that is used by the migratory birds of Illinois therefore will have an impact on the citizens of Illinois who engage in these recreational pursuits, as well as those who provide them goods and services. The protection of the habitat of migratory birds – a natural resource that no one State truly possesses – is the ideal subject for federal concern.

3. The petitioner extols the State of Illinois' review of its project, contending that federal intervention is "unnecessary" and "burdensome." Brief for Petitioner at

30. That one of the 50 States may have adequately reviewed a particular project does not answer the larger question whether the regulation of the interstate impacts of wetland fill is within Congress' enumerated powers. To win the necessity argument, the petitioner at a minimum would need to demonstrate that *all* 50 States have adopted and enforced wetland regulatory programs that are comparable to Section 404.

In fact, very few States have adopted comprehensive wetland regulation.[10] Some States, such as Delaware and Georgia, regulate tidal wetlands but are entirely dependent on section 404 for the protection of isolated, inland wetlands. *See* Del. Code Ann., Tit. 7, §§ 6601-6620; Ga. Code Ann., § 12-5-280. Those States with no or limited wetland regulation include Alabama, Arizona, California, Colorado, Georgia, Idaho, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. *See* Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends*, prepared for the Association of State Wetland Managers (1995), at 5-8; Ill. Dept. of Natural Resources, *Nationwide Survey of State Wetland Regulatory Programs* (Oct. 1997). Indeed, most state wetland regulation occurs pursuant to the State's federally-inspired section 401 water quality certification program, or as coastal regulation assisted by the federal Coastal Zone Management Act. *Id.*

Consequently, there is a compelling need for federal wetland regulation because of the regulatory void that

---

[10] Michigan is an example of a State that has adopted a comprehensive wetland program. *See* Mich. Comp. Ann. §§ 281.683-685, 281.701-722, 322.701 et seq.

would exist in its absence. In any event, the petitioner's claim that federal regulation is unnecessary and burdensome involves a matter of congressional policy, not constitutional authority.

4. The citizens of one State should not be placed at a competitive disadvantage because they have chosen to implement environmental standards when other States have not. This Court more than once has sustained federal legislation to prevent interstate competition that would frustrate an important and legitimate federal objective. In *Hodel* v. *Virginia Surface Mining*, 452 U.S. at 281-82, the Court acknowledged that preventing destructive interstate competition is a traditional role for Congress under the Commerce Clause, and deferred to Congress' determination that nationwide standards were necessary to insure that interstate competition in coal mining would not undermine environmental quality. In *United States* v. *Darby*, 312 U.S. 100, 114 (1941), the Court upheld a law prohibiting the interstate shipment of goods that were produced in violation of the Fair Labor Standards Act, preventing employers in one State from gaining a competitive advantage through substandard working conditions. *See Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-58 (1964) (preventing channels of commerce from being used for racial discrimination).

In this case the United States has identified wetland preservation as an important national objective, spending hundreds of millions of dollars on both regulatory and non-regulatory programs (such as the North American Wetlands Conservation Act, 16 U.S.C. §§ 4401-14 and the Water Bank Act, 16 U.S.C. §§ 1301-11). *See generally* Exec. Order No. 11990, 42 Fed. Reg. 26,961 (May 24, 1977), *reprinted as amended in* 42 U.S.C. § 4321. This objective

would be frustrated, to the detriment of the States, unless there is federal wetlands regulation that insures that federal wetland policy is not undercut by inadequate State standards. Although the petitioner disagrees that there is a need to prevent a "race to the bottom," Brief for Petitioner at 29, that objection goes to the wisdom of federal wetland regulation, not to whether Congress has the power to prevent persons from gaining a competitive advantage by pursuing their projects in States with inadequate wetland regulation.

5. Concurrent federal regulation more often than not supports the States' own environmental objectives, and may lessen the financial burdens on the States. For example, where an activity violates both federal and State pollution control laws, the State may choose to defer to federal enforcement, thereby saving the States the burden of duplicative regulation. In other instances, the States may coordinate their environmental studies with the federal government, avoiding duplication and effecting cost savings to the States and permit applicants. *See, e.g.*, Cal. Code Reg., tit. 14, § 15226. The federal government also may provide expertise to State and local governments through the identification and mapping of wetlands. Kusler, et al., *State Wetland Regulation: Status of Programs and Emerging Trends, supra*, at 14. Some States simply may choose to find that the federal government's regulation of wetlands is sufficient, and apply the money saved to some other beneficial purpose.

6. The process of government regulation continues to mature, and the relationship between State and federal regulators has become increasingly cooperative. In California, for example, state agencies have joined with federal agencies to establish an Interagency Vernal Pool Initiative. *See California Wetlands Information Systems,*

<*http://ceres.ca.gov/wetlands/geoinfo/vernal—pools*>. State and federal regulators in California have experimented with a single permitting process in which an applicant who wishes to dredge and dispose of fill makes a single, multi-agency application and any environmental study is conducted jointly by the regulatory authorities. *See* San Francisco Bay Conservation and Dev. Comm'n, *1999 Annual Report*, 17. State and federal personnel also cooperate in the enforcement of their respective statutory requirements. *Id.* at p. 12 (describing Environmental Law Enforcement Task Force).

California's experience has been repeated throughout the country. States such as Delaware, Illinois, Oregon, Virginia, Wyoming, New Jersey, Kansas, Alabama and Alaska have adopted joint permitting procedures with the Corps. Kusler, *State Wetland Regulation: Status of Programs and Emerging Trends, supra*, at 22. Other States such as the New England States, Maryland, New York and Pennsylvania have State Programmatic General Permit Authority, under which the Corps and the States have agreed to divide permit responsibility on particular projects. Kettering, *Praise for General Permits*, National Wetlands Newsletter, Vol. 16, No. 4, July/Aug. 1994, at 8. In Wisconsin, Indiana and Minnesota, the States and the Corps have agreed upon a regional general permit, which tailors general permits to the needs and conditions in a particular State. *See Association of State Wetland Managers*, <*http://www.aswm.org/nationwidepermits*>. Of course, any State may seek to assume section 404 permit authority and displace the Corps, 33 U.S.C. §§ 1344(g); 33 C.F.R. § 323.5, although only Michigan and New Jersey to date have chosen to do so. Kusler, *State Wetland Regulation: Status of Programs and Emerging Trends, supra*, at 99, 121. If they are to be "laboratories for experimentation," *Lopez*,

514 U.S. at 581 (Kennedy, J., concurring), the States' freedom to innovate should include the opportunity to coordinate the management of their natural resources with the federal government.

B. Section 404's Permit Requirement Is Environmental Regulation, Not a Form of Land Use and Zoning Traditionally Reserved to the States

The petitioner's claim that the migratory bird rule intrudes upon the traditional authority of State and local governments to engage in land use planning – a rationale that would apply to any form of federal wetland regulation – is misplaced. This is a not a case in which a federal regulation has crossed the line dividing "what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68.

1. Controlling the impacts of pollution and protecting natural resources has long been a matter of joint Federal and State concern. *See, e.g., Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (States' authority in regulating wildlife and natural resources is shared with the Federal Government); *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) (describing national interest in protecting migratory birds); *Andrus* v. *Allard*, 444 U.S. 51, 63 n. 19 (1979) (national commerce power reaches migratory wildlife). There is a long history of federal legislation in the area of pollution control and resource protection, and it is unnecessary to recount it all here. *E.g.*, Lacey Act, 16 U.S.C. § 701; Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-12; *see* p. 19, n. 7 *supra*. Moreover, the Court has acknowledged that federal protection of the environment and natural resources is

the proper subject of federal regulation under the Commerce Clause. *See* pp. 19-20 *supra*. One may fairly debate the wisdom of these measures, but any debate about the legitimacy of a federal presence in environmental protection should have ended a long time ago.

2. Although land use planning and zoning is traditionally a matter of State and local concern, the permit requirement in section 404 does not constitute conventional land use planning or zoning. Section 404 is a form of environmental protection or pollution control, *see* 33 U.S.C. § 1251, and leaves the ultimate determination of land use to State and local authorities.

In *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572 (1987) (O'Connor, J.), the Court found the distinction between land use planning and environmental protection critical to its preemption analysis. The Court in *Granite Rock* upheld the authority of a state agency to regulate the impacts of mining on federal public lands because it found that the agency's review was limited to the environmental impacts of mining and did not determine the underlying land use. The Court expressed the distinction this way: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* at 587; *see Hodel* v. *Virginia Surface Mining*, 452 U.S. at 275-76.

Section 404 does not dictate the particular use to which a parcel of property may be employed; it regulates the manner in which the proposed use can be accomplished by eliminating or mitigating the environmental impacts of fill. That the Corps rarely denies a section 404

permit provides further corroboration that the Corps is not dictating land uses. Zinn and Copeland, *Wetland Issues*, Congressional Research Service Issue Brief, May 1, 2000 (between 1995 and 1999 the Corps denied only 0.3% of the annual 74,500 permit requests). Even in those rare cases where a permit is denied, landowners still may be able to modify their project and proceed with their intended use of the property, or else pursue their Fifth Amendment remedy. *See* p. 10 *supra*. Section 404 is a classic form of environmental regulation, not land use and zoning.

3. Federal regulation is not always a good thing. Federal regulation sometimes imposes costs or inefficiencies that the States properly resist, or values the interests of some States over those of others. The issue here, though, is power, not policy. Virtually every day there is new information that changes how we view the physical world, and the public continues to discover how their lives are affected by what goes on in the rest of the country. For matters as profound as the preservation of the nation's remaining wetlands, the courts should not prohibit Congress from choosing a federal solution as long as Congress has a rational basis for finding that a particular economic activity in the aggregate has a substantial effect on the commerce of the country. If the federal solution turns out to be too costly, ineffective, or intrusive, the States and their citizens will look to the political process to make the necessary adjustments.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant
Attorney General

DENNIS M. EAGAN
Supervising Deputy
Attorney General

JOSEPH BARBIERI
Deputy Attorney General
Counsel of Record

Attorneys for Amici Curiae

September 2000